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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1952. No.

WASHINGTON LUMBER & MILLWORK CO.,
Petitioner,

VS.

DANT & RUSSELL SALES CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Washington Lumber & Millwork Co., Petitioner, prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Pennsylvania entered in the above entitled case on May 26, 1952.

OPINION BELOW.

The opinion of the Supreme Court of Pennsylvania is reported at 370 Pa. 627.

JURISDICTIONAL STATEMENT.

The judgment of the Supreme Court of Pennsylvania was entered on May 26, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

Petitioner seeks review of the judgment of the Supreme Court of Pennsylvania, the highest appellate court of the Commonwealth of Pennsylvania.

QUESTIONS PRESENTED.

1. In a case in which a buyer relies upon inventory regulations promulgated by the National Production Authority under Public Law 774—81st Congress, Chapter 932—2d Session, H. R. 9176, and cited as the Defense Production Act of 1950, which regulations prohibit delivery and acceptance of certain prescribed materials if that would cause the buyer's inventory to exceed certain limits, may such buyer be properly held liable for damages for alleged breach of a contract entered into before such regulations were established for refusal to accept delivery of such prescribed and

prohibited material tendered after the effective date of the said regulations.

2. Is there a duty on a defendant buyer attempting to act in accordance with the provisions and requirements of the Defense Production Act of 1950 to reduce inventory or to defer acceptance of delivery of material prescribed under the inventory regulations promulgated pursuant to the said Act.

STATUTE INVOLVED.

The Petitioner in this case invokes the protection of the Defense Production Act of 1950, and inventory regulations promulgated thereunder. The pertinent statutory provisions are printed in Appendix "A" infra pages.

STATEMENT.

This is an action in Assumpsit. The Complaint filed by the Plaintiff (here the Respondent) set forth a claim for damages based upon an alleged contract for the sale of lumber. The Defendant (here the Petitioner) ordered a certain quantity of lumber, hereinafter more fully described, and subsequently cancelled the order. The Plaintiff resold the lumber and brought suit for the difference in price between the contract price and the resale price.

The Defendant based its right to cancel the contract to purchase on the Inventory Control Rules and Regulations

promulgated under the Defense Production Act of 1950, alleging that it was required by the regulations to cancel said contract because its inventory would become excessive under the law which would subject it to criminal and civil prosecution by the Federal Government.

On or about September 1, 1950, Plaintiff, an Oregon Corporation engaged in the selling of lumber at wholesale, loaded and shipped to itself a cargo of lumber, part of which is the subject of this action, aboard the S. S. Cygnet from the Pacific Coast to Philadelphia, Pennsylvania (112a). While this lumber was in transit, to wit: on or about September 14, 1950, Plaintiff and Defendant entered into a contract wherein and whereby said Defendant purchased from Plaintiff approximately 180,000 feet of lumber F. O. B. Philadelphia, which lumber was on board the said ship in transit (127a). The original order acceptance read F. O. B. Dock, but since the lumber in question was on the high seas for a period of approximately two weeks at the time the order was placed by the Defendant, the word "Dock" could only mean dock of delivery, and in the instant case delivery was made at Philadelphia, Pennsylvania. The lumber arrived in Philadelphia October 10, 1950 (31a). On or about October 16, 1950, the Defendant cancelled its order for the lumber due to the fact that its acceptance would have been a direct violation of regulations issued by the National Production Authority on September 18, 1950, hereinafter more fully discussed (107a).

Almost three months later, the Plaintiff claims to have resold the lumber in question at a price substantially lower than the sales price charged by the Plaintiff to the Defendant. Approximately 24,000 feet of the order of lumber in question was sold on or about January 4, 1950 at $69.50 per 1000 feet (39a), and on January 9, 1951, the balance of the lumber in question was sold for approximately $68.00 per 1000 feet (41a). The contract price between the Plaintiff and the Defendant was $94.00 per 1000 feet.

The Defendant's contention in this case is that had it

consummated the contract for said lumber, it would have been a direct violation of the Federal statute cited as The Defense Production Act of 1950 and Inventory Regulations made pursuant thereto, having more particular reference to that part of the law which prohibits persons from hoarding or accumulating materials including inter alia lumber, specifically mentioned in the Regulations as scarce and critical materials. Defendant takes the position that acceptance of this order would have increased its inventory as much as 100% above its minimum workable inventory. This stand was not challenged by the Plaintiff, and, in fact, was substantiated by the finding of the Trial Court. Defendant, therefore, contends it had a legal right and was compelled to cancel the agreement made with Plaintiff, and, as a matter of fact, was obligated under the law so to do.

The case was brought to trial before the Honorable Thomas Bluett of the Court of Common Pleas of Philadelphia County, Pennsylvania, sitting without a jury. The Trial Judge found for the Defendant as a matter of law (120a) but thereafter a court en banc sustained exceptions thereto (134a) and entered judgment, notwithstanding the finding of the Trial Judge, for the Plaintiff below, the Respondent here; in the sum of $5446.85 (133a). Thereafter this judgment was affirmed by the Supreme Court of Pennsylvania.

Throughout the case the Petitioner has raised and has relied upon the provisions of the Defense Production Act of 1950 and the Inventory Control Rules and Regulations promulgated thereunder. Thus in the Answer to the Complaint the Petitioner specifically raised and relied upon the provisions of the said Act (8a, et seq.). Similarly Petitioner in its New Matter set forth at length and relied upon the provisions of the Federal Law (11a, et seq.). Repeatedly during the testimony before the Trial Judge the question of the force and effect of the Federal statutory provisions was raised (72a, 73a, 74a, 78a, 79a, 86a, 92a, 93a, 95a, 96a, 101a). The Trial Judge, in entering his original finding for

the Petitioner here, relied specifically and exclusively upon the fact that "the acceptance of the lumber in question by the Defendant would have been a violation of the Federal statute known as 'The Defense Production Act of 1950' and the Regulations thereunder, as the acceptance by the Defendant would have increased the Defendant's inventory of materials designated as scarce and critical to amounts from 50% to 100%, which would have been in defiance of the above mentioned Act and the Regulations pertaining thereto" (120a).

The court en banc in reversing the Trial Judge recognized the reliance that was placed upon the federal statute and regulations (128a) but concluded that the statute and the regulations were not applicable to the situation in the instant case (129a). The court en banc was of the opinion that the sale had been consummated and completed four days before NPA Regulation 1 was promulgated (130a).

The Supreme Court of Pennsylvania also recognized the fact that the Petitioner relied upon the provisions of NPA Regulation 1 promulgated pursuant to authority of the Defense Production Act of 1950 (370 Pa. 627, 628). The Supreme Court of Pennsylvania held, however, that the Petitioner had not made a prompt cancellation of its order as required by the NPA Regulation 1, and that the sale of the lumber in question had been consummated prior to the issuance of the regulation (370 Pa. 627, 628, 629).

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Pennsylvania erred:

1. In failing to hold that the Petitioner who acted in reliance upon and in accordance with NPA Regulation 1

and the Defense Production Act of 1950 was insulated from liability for failing to carry out a contract which if fulfilled would have caused Petitioner's inventory to exceed the limits allowed by Federal Statute.

2. In failing to render effective the protection against liability afforded by Section 707 of the Defense Production Act of 1950 to persons acting in compliance with NPA Regulation 1.

3. In holding that there was a duty on the Petitioner to reduce its inventory or to defer acceptance of delivery when Petitioner was seeking to act in compliance with NPA Regulation 1.

4. In affirming the judgment of the court en banc.

REASONS FOR GRANTING THE WRIT.

This case raises an important federal question regarding the compliance with and enforcement of the Defense Production Act of 1950. The net effect of this decision by the Pennsylvania Courts causes a most serious limitation upon the effectiveness of the Defense Production Act of 1950 and may fairly be said to subvert the end sought to be obtained by this emergency legislation. In the instant case a buyer who sought to adhere to the spirit and the letter of the federal law has been held liable in damages on its contract just as though the federal statutory provision did not exist. It is submitted that the unchallenged recognition of the Pennsylvania decision will cause persons to be fearful of complying with the requirements of the Defense Production Act and will enable sellers to continue trafficking in

strategic and scarce commodities and will render most doubtful the achievement of the objectives sought to be obtained by the federal legislation.

Insofar as research discloses the present case is the first of its kind which raises the interpretation of and the protection afforded by the Defense Production Act of 1950. Since it arose in a state court it is earnestly submitted that it is of even greater moment that your Honorable Court undertake to review the decision reached below so as to be able to announce rules and interpretations for the guidance of the Courts in applying and enforcing such an important piece of Federal Legislation.

The court en banc and the Supreme Court of Pennsylvania construed the words in the contract "F. O. B. Dock" to refer to the point of origin on the Pacific Coast rather than Philadelphia the point of arrival. Consequently it was held that the contract had been consummated and title had passed from the seller to the buyer before ever the lumber arrived in Philadelphia and thus at a point and time before the promulgation of NPA Regulation 1. Actually by resorting to this highly technical interpretation of the passage of title the state courts succeeded in avoiding the purposes of and the controls established by the Defense Production Act of 1950. The conclusion was reached that the lumber being purchased had become part of the Petitioner's inventory at a time when it was still part of a cargo on the high seas being shipped by the Respondent consigned to itself. By resort to this reasoning the Pennsylvania courts took this case away from the operation of the inventory controls established under the Defense Production Act of 1950.

Petitioner earnestly submits that the force and effect of such enormously important National Legislation should not be minimized or limited by such narrow technical interpretations of passage of title. Moreover the spirit of the legislation requires that buyers be able to act in accordance with the statute free from the fear that limited interpreta-

tions by state courts will ultimately result in the imposition of liability.

The questions presented are clearly of importance in the administration of the Act basic to the effort of the country to adjust itself and prepare itself in a time of most critical international relations.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDWIN P. ROME,
Attorney for Petitioner.

APPENDIX "A."

PUBLIC LAW 774—81st CONGRESS

CHAPTER 932—2d SESSION

H. R. 9176

Cited As

THE DEFENSE PRODUCTION ACT OF 1950.

TITLE I—PRIORITIES AND ALLOCATIONS

Sec. 101. The President is hereby authorized (1) to require that performance under contracts or orders (other

than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

Sec. 102. In order to prevent hoarding, no person shall accumulate (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices, materials which have been designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation. The President shall order published in the Federal Register, and in such other manner as he may deem appropriate, every designation of materials the accumulation of which is unlawful and any withdrawal of such designation. This section shall not be construed to limit the authority contained in section 101 of this Act.

Sec. 103. Any person who willfully performs any act prohibited, or willfully fails to perform any act required, by the provisions of this title or any rule, regulation, or order, thereunder, shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

Sec. 704. The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act. Any regulation or order under this Act may be established in such form and manner, may contain such classifications and differentia-

tions, and may provide for su such adjustments and reason-
able exceptions as in the jud dgment of the President are
necessary or proper to effectu uate the purposes of this Act,
or to prevent circumvention o or evasion, or to facilitate en-
forcement of this Act, or any ru rule, regulation, or order issued
under this Act.

Sec. 707. No person shall b be held liable for damages or
penalties for any act or failur re to act resulting directly or
indirectly from his compliance ce with a rule, regulation, or
order issued pursuant to this is Act, notwithstanding that
any such rule, regulation, or o order shall thereafter be de-
clared by judicial or other cor ompetent authority to be in-
valid. No person shall discrim minate against orders or con-
tracts to which priority is assi signed or for which materials
or facilities are allocated under er title I of this Act or under
any rule, regulation, or order i issued thereunder, by charg-
ing higher prices or by imposi sing different terms and con-
ditions for such orders or cont ntracts than for other gener-
ally comparable orders or contr tracts, or in any other manner.

APPENDI DIX "B."

CHAPTER I—NATIONAL PR PRODUCTION AUTHORITY,
DEPARTMENT O OF COMMERCE

(NPA R Reg. 1)

PART 10—INVENT NTORY CONTROL

AUTHORITY: 10.1 to 10.16 6 Issued under sec. 704, Pub.
Law 774 81st Cong. Interpret et or apply sec. 101, Pub. Law

774, 81st Cong., sec. 101, E. O. 10161, Sept. 12, 1950, 15 F. R. 6105.

10.1 PURPOSE. The purpose of this part is to prevent the accumulation of excessive inventories of materials in short supply. It does this by limiting the quantities of such materials that can be ordered, received, or delivered.

10.2 MATERIALS COVERED. This part applies only to those materials listed in the attached Table I in the shapes and forms therein specified.

10.4 PRACTICABLE MINIMUM WORKING INVENTORY. As used in this part, the term "practicable minimum working inventory" means the smallest quantity of material from which a person can reasonably meet his deliveries or supply his services on the basis of his currently scheduled method and rate of operation. In the absence of unusual circumstances if the ratio of a person's inventory to his currently scheduled operations is substantially greater than the ratio which he found it necessary to maintain between inventory and operations during the recent past, his inventory will be considered excessive.

10.5 RESTRICTION ON RECEIPTS. (a) No person may receive or accept delivery of material listed in table I if his inventory of that material is, or by such receipt would become, more than a practicable minimum working inventory.

(b) In figuring his inventory, a person must include all such material in his possession or held for his account by others but not that held by him for the account of others. Material is considered to be in inventory until actually put into process or actually installed or assembled.

10.13 DEFENSE AGAINST CLAIMS FOR DAMAGES. Persons complying with this part are entitled to the protection afforded by section 707 of the Defense Production Act of 1950, which provides in part that "No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from his compliance with a rule, regulation, or order issued pursuant to this act, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid."

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952. No. 257.

WASHINGTON LUMBER & MILLWORK CO.,
Petitioner,

v.

DANT & RUSSELL SALES CO.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

OPINION BELOW.

The opinion of the Supreme Court of Pennsylvania is reported at 370 Pa. 627.

STATEMENT OF THE CASE.

This is an action in assumpsit by a wholesale lumber company against a retail lumber dealer for damages resulting from the latter's repudiation of a contract to purchase lumber from plaintiff.

Plaintiff (herein the respondent) is an Oregon corporation, with home offices in Portland, Oregon, and a branch office in Philadelphia, Pennsylvania, and is engaged in the business of selling lumber at wholesale (R 20a). Defendant (herein the petitioner) is a partnership engaged in the retail lumber business in Philadelphia (R 20a). On September 14, 1950, when the prevailing market price of lumber was extremely high (R 51a-52a), plaintiff accepted an order from defendant for the purchase by defendant from

plaintiff of approximately 180,000 feet of No. 3 Common Green Douglas Fir Lumber at $94.00 per thousand feet (R 21a-22a, 103a). At the time of this sale, the lumber was already in transit from the Pacific Coast to Philadelphia aboard the S. S. Cygnet, it having been loaded and shipped on the West Coast by plaintiff about September 1, 1950 (R 21a, 33a-34a, 103a). The sale was termed "F.O.B. dock" meaning that the total contract price of $16,912.01 payable by defendant included cost of transportation by water, backhauling, marine insurance and insurance against fire, theft, pilferage, breakage, non-delivery and oil damage (R 21a-22a, 103a, 105a). In addition, defendant agreed to pay the freight tax on the shipment of $108.02 and to assume the risk of loss in transit (R 22a, 43a, 103a, 105a-106a). On October 10, 1950, the S. S. Cygnet arrived in Philadelphia, and on October 11, 1950, the lumber purchased by defendant was unloaded at the pier of the Ontario Land Company and stacked there for pick-up by defendant (R 31a). The Ontario Land Company immediately notified defendant of the arrival of the lumber and that the lumber was being held there for defendant's account (R 37a-38a). Meanwhile, the prevailing market price of lumber had dropped sharply (R 52a, 66a); and on October 16, 1950, defendant notified plaintiff in writing that it cancelled the sale of September 14, 1950 on the ground that fulfillment of its contractual obligations to plaintiff would constitute a violation of Federal Inventory Control regulations, first issued on September 18, 1950 (R 107a). The Federal regulation referred to by defendant was NPA Regulation 1 issued by the National Production Authority pursuant to section 101 of the Defense Production Act of 1950 (R 11a, 107a). On October 17, 1950, plaintiff notified defendant that it would not accept cancellation of the sale inasmuch as acceptance of the lumber by defendant would not violate NPA Regulation 1 or any other Federal regulation (R 111a-112a). Thereafter, on four separate occasions, defendant

attempted to re-negotiate the price of the lumber, suggesting that if the price were reduced to reflect the decline in the market, it would immediately accept delivery of all the lumber; and on none of these occasions did it claim that its refusal to take the lumber was occasioned by the restrictions on inventory contained in NPA Regulation 1 (R 84a-89a, 91a-92a, 131a). When these efforts proved unsuccessful, defendant sought refuge behind the provisions of NPA Regulation 1 and flatly refused to accept the lumber at the contract price then or at any time in the future (R 25a). Meanwhile, the slump in the lumber market continued (R 52a, 66a), and the price of No. 3 Common Green Douglas Fir Lumber reached a point as low as $65.00 per thousand feet (R 55a-56a). In January of 1951, however, the lumber market showed marked improvement (R 53a, 66a), and on January 4 and January 9, 1951, plaintiff resold all the lumber purchased by defendant for a total price of $12,304.29, this price representing sales of the various parcels at $68.00, $69.50 and $70.00 per thousand feet (R 38a-41a, 44a-45a, 109a, 110a).

On this state of the record, the Lower Court entered judgment for plaintiff in the amount of $5,446.85, being the difference between the original contract price of the lumber and its fair market value on resale plus incidental expenses incurred by plaintiff as a result of the breach. On appeal the judgment of the Lower Court was unanimously affirmed by the Supreme Court of Pennsylvania.

ARGUMENT.

Throughout the course of the extensive litigation in this case, defendant (herein the petitioner) has doggedly, and with signal lack of success, contended that performance of its contract with plaintiff (herein the respondent) was rendered illegal by NPA Regulation 1, and that it was therefore released from its contractual obligations to plaintiff without liability. In its present petition, defendant argues that the action of the Pennsylvania courts in rejecting its alleged reliance on a self-serving interpretation of this Federal regulation is sufficient basis for granting it an opportunity to overturn the unanimous decision of the highest court of that State. In so doing, however, defendant neatly overlooks the following factors, which completely discredited its argument in the eyes of the Pennsylvania courts, and which should lead this court to believe that absolutely no question regarding compliance with or enforcement of NPA Regulation 1 or the Defense Production Act of 1950 is raised by the decision of the Pennsylvania courts.

I. Defendant Failed to Prove That Acceptance of the Lumber Would Have Given It More Than the "Practicable Minimum Working Inventory" Permitted Under NPA Regulation 1.

NPA Regulation 1 prohibits current delivery by a seller to the buyer only if at the time scheduled for delivery the inventory of the buyer would thereby be unduly enlarged over the "practicable minimum working inventory" permitted the buyer under the Regulation. What is meant by "practicable minimum working inventory" is clearly set forth in Section 10.4 of the Regulation. This proof, then, was the most basic ingredient of defendant's case. Yet in the words of the Supreme Court of Pennsylvania (R 137-138):

> "The defendant failed to prove that acceptance of the lumber would have given it more than the 'prac-

ticable minimum working inventory' permitted under the regulation."

Without proof of this fundamental fact, defendant's entire case must of necessity fall at its very outset, its legal arguments become academic, and no basis whatsoever remains for the present petition.

II. Title to the Lumber Passed to Defendant Prior to the Promulgation of NPA Regulation 1 and the Lumber Was Already Part of Defendant's Inventory at the Time When the Restrictions Imposed by that Regulation Became Operative.

The Pennsylvania courts held that title to the lumber passed to defendant prior to the effective date of NPA Regulation 1, with the obvious result that any restrictions on deliveries contained in that Regulation were completely immaterial insofar as the instant transaction was concerned (R 130a, 136). Questions regarding the passage of title in commercial transactions are peculiarly a matter of State law and no citation of authority is needed for the proposition that this court will not disturb the determination of the highest state court in a question of this nature. No question of "subverting" the aims of Federal legislation is involved in such determination. This particular transaction was simply consummated prior to the time when the Federal controls became effective. As a matter of fact, a situation of this type is specifically recognized by the very terms of the Regulation. Thus, a buyer in figuring the practicable minimum working inventory permitted him under the regulation "must include all such material in his possession or held for his account by others" (Section 10.5b). And if the inclusion of the latter gives him more than what would normally be his practicable minimum working inventory, there is no violation of the Regulation because it does not require "disposal of excess inventory which may be on hand" (Section 10.5c). In the instant

case, the lumber in question was clearly held for defendant's account by Ontario Land Company at the time when defendant calculated its practicable minimum working inventory (if, in fact, any such calculation was ever made) (R 37a-38a), and therefore under the express terms of the Regulation should have been included in defendant's inventory.

III. Defendant Could Lawfully Accept Delivery of the Lumber Because It Had Been Loaded, Shipped, Invoiced and Otherwise Consigned by Plaintiff to Defendant Prior to the Receipt by Plaintiff From Defendant of Any Timely Notice to Adjust the Order in Accordance With the Terms of the Regulation.

NPA Regulation, Section 10.9a, provides that "delivery may be made and accepted if the supplier has shipped the material or loaded it for shipment before the receipt of the instruction to adjust". In the instant case, the lumber was loaded, shipped, unloaded and segregated for defendant's account, invoiced and otherwise consigned to defendant prior to receipt by plaintiff from defendant of any timely notice to adjust the order pursuant to the Regulation. As a matter of fact, defendant never made any effort to adjust the order, either timely or otherwise. Accordingly, plaintiff was entitled to make delivery of the lumber, and defendant was correspondingly entitled to receive it without violating either the plain meaning or the spirit of NPA Regulation 1.

IV. Defendant Utilized the Regulation in Bad Faith as a Mere Device for Avoiding the Impact of Potential Losses Resulting From a Falling Lumber Market.

NPA Regulation 1 merely prohibits *current delivery* of lumber by a seller to the buyer if at the time scheduled for *delivery* the inventory of the buyer would be thereby unduly enlarged over the "practicable minimum working inventory" permitted the buyer under the Regulation. The Regu-

lation does not purport to invalidate contracts of sale made prior to its promulgation. Furthermore it "does not confer an absolute right to cancellation of an order in any case, but offers to both parties the alternatives of reduction and deferment thereby enabling the parties to hold to a minimum the interference with existing contracts". Interpretation 1, NPA Regulation 1. Thus, even if defendant's inventory was excessive at the time scheduled for delivery (and there is absolutely no proof that it was), it was obviously not automatically released from its contractual obligations to plaintiff and entitled to repudiate the agreement at will. Rather, it was its duty to arrange for delivery at a subsequent time when it could have accepted the lumber at the contract price without exceeding the practicable minimum working inventory permitted it under the Regulation. The reason why defendant did not do this and instead repudiated the contract was obvious to the Lower Court and to the Supreme Court of Pennsylvania. At the time when defendant originally contracted to purchase the lumber the prevailing market price of lumber was extremely high (R 51a-52a). Shortly thereafter, the prevailing market price of lumber dropped sharply, and remained in a depressed condition for several months (R 52a, 66a). Faced with considerable financial loss, defendant first said nothing about NPA Regulation 1 and suggested to plaintiff that it would willingly accept immediate delivery of all the lumber if the price were renegotiated down to reflect the decline in the market (R 84a-89a, 91a-92a, 131a). When this was refused and the full contract price insisted upon, defendant seized upon the coincident promulgation of NPA Regulation 1 as a happy means of escaping a commitment no longer as attractive as it had originally appeared to be, and at the same time avoiding all liability to plaintiff. As the Supreme Court of Pennsylvania so accurately summarized (R 137):

> "But the defendant did not avail himself of the method of prompt cancellation, reduction or deferment

in accordance with the regulation, all of which substantiates the plaintiff's argument that the defendant sought utilization of the Regulation only as a device to avoid potential losses resulting from a falling market."

and as the Lower Court so aptly stated (R 129a-130a):

"It would seem, therefore, that while the intention of the regulation was to prohibit delivery at a time when the buyer's inventory was excessive, it was at the same time intended to prevent it being used as a device to avoid business deals which had become unprofitable to the buyer at the time delivery was scheduled.

"The courts should prevent such a misuse of the regulation, if possible, as otherwise the door might be opened to permit many unwarranted actions by purchasers to put through their own interpretation of the Federal regulations seeking to avoid business deals which appeared good at the date of the contract, but not so good at the time of delivery because of price fluctuations."

In view of this background, it is submitted that no Federal question of substance is present in this case and that no injustice could conceivably be done to this defendant by denying its Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

WALTER BIDDLE SAUL,
Attorney for Respondent.
PHILIP M. HAMMETT,
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SAUL, EWING, REMICK & SAUL,
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